

## **Chapter 9 - Contractor Qualifications**

### **Section 9.1 Procedures for Documenting Organizational Conflict of Interest Decisions Prior to Contract Award**

#### **9.1.1 PURPOSE**

This section provides EPA Contracting Officers (COs) with guidance on procedures for documenting organizational Conflicts Of Interest (OCI) decisions that occur prior to contract award.

#### **9.1.2 BACKGROUND**

The Federal Acquisition Regulation (FAR) Subpart 9.5 requires COs to analyze planned acquisitions in order to: 1) identify and evaluate potential organizational conflicts of interest (OCIs) as early in the acquisition process as possible; and 2) avoid, neutralize, or mitigate significant potential conflicts before contract award.

EPAAR Subpart 1509.5 prescribes standard EPAAR clauses to be used in most solicitations and contracts, except where a particular acquisition requires special provisions. The standard EPAAR solicitation provisions (EPAAR 1552.209-70 and 1552.209-72) require an offeror to certify that it is unaware of any potential OCI or to disclose any potential OCI of which it is aware. The standard EPAAR contract clause (EPAAR 1552.209-71) requires a contractor to also make full disclosure of any actual or potential OCIs discovered after contract award.

In addition, a recent Comptroller General's (CG) decision (B-241372, 2/6/91), involving an EPA CO's decision to properly exclude a contractor due to a potential OCI, provides further clarification of a CO's responsibility in evaluating OCIs. This section, based to some degree on the CG decision, provides procedural guidance for a CO to use in resolving and documenting potential OCIs prior to contract award.

This section was originally issued as a Procurement Policy Notice (PPN) 91-06 dated July 23, 1991 by David J. O'Connor, Director Procurement and Contracts Management Division (PCMD) to Associate Directors, PCMD Branch and Staff Chiefs, PCMD Section Heads, Director, CMD, RTP and the Director, CMD, CINN.

#### **9.1.3 AUTHORITY/APPLICABILITY**

The authority for this section is based on FAR subpart 95, EPAAR subpart 1509.5 and the CG decision.

#### **9.1.4 DEFINITIONS**

The FAR defines "organizational conflict of interest", as meaning "that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage."

### **9.1.5 POLICY**

Contracting Officers should make every attempt to resolve potential OCIs through steps that will neutralize or mitigate these potential OCIs without excluding offeror from competing. Generally, offeror will be required to address issues related to OCIs in their proposals. In unusual circumstances, and after consultation with the Office of General Counsel (OGC), potential offeror may be requested to address safeguards against OCIs prior to submission of proposals.

When necessary due to the nature of the potential OCI, and upon approval by the Director, Office of Acquisition Management (OAM), COs not able to otherwise avoid, mitigate, or neutralize an OCI must exclude offeror from competition. The Acquisition Policy and Training Service Center (APTSC) and OGC must be consulted with regard to proposed actions to resolve an OCI. Additionally, the Competition Advocate must be consulted before imposing any restrictions that would reduce competition. The CO must notify affected offeror of any proposed actions, including plans to exclude them from further participation in the competition, and allow them a reasonable opportunity to respond prior to the CO's final decision implementing such proposed actions.

COs should evaluate potential OCI issues as early in the acquisition process as possible to avoid having offeror unnecessarily incur proposal costs only to later be excluded from competing for the contract. COs must document their evaluation only when a substantive potential OCI exists. A CO's evaluation should include potential OCIs at the subcontractor level as well as the prime contractor level.

COs must evaluate potential OCI issues related to each procurement separately and may NOT impose across-the-board restrictions that will limit a potential offeror's ability to compete for EPA contracts.

#### **9.1.5.1 Policy Support Contracts**

COs should pay particular attention to those contracts most susceptible to potential OCIs, such as contracts that assist in the development of Agency policy. It would generally be considered improper to have a contractor assist in the development of policy that would have a direct impact on the same contractor, such as a Superfund Response Action Contractor (RAC) assisting in the development of policy to be followed in performing response action work. In a case such as this,

the CO should evaluate how potential OCIs might be neutralized or mitigated. If the CO determines that potential OCIs cannot be otherwise neutralized or mitigated, the CO must avoid the OCI by excluding sources with conflicts from competition.

Appendix 9.1A, Sample Clauses used in a Solicitation to Exclude RAC Contractors for Award of a Policy Support Contract, contains sample clauses similar to those used in an EPA solicitation for Superfund policy support. In this sample, the CO determined that an OCI could be avoided only by excluding RAC contractors from award. As indicated in Appendix 9.1A, offeror were required to demonstrate that at the time of anticipated contract award it would not be a RAN or that its status as a RAC would not create a significant potential for an OCI. The CO determined prior to issuing the solicitation that the holders of certain EPA prime contracts would create a significant potential for an OCI and would therefore be ineligible to compete. Offeror who first successfully demonstrated they were not RACs were eligible to submit proposals. This attachment is provided for COs that may be working on similar solicitations.

#### **9.1.5.2 Procedures**

A) The following is an overview of the basic steps a CO should take in reviewing acquisitions for potential OCI prior to award and in documenting the official contract file. Each acquisition must be handled individually with these procedures adapted to the specific acquisition. The assigned CO should:

- 1) Understand thoroughly what services a contractor is expected to perform under the proposed contract by reading the statement of work and through discussions with the program office and procurement officials.
- 2) Review FAR and EPAAR requirements on OCI and additional guidance provided by OAM to evaluate possible OCI issues that may relate to the subject procurement.
- 3) If OCI appears to be a concern, also discuss the procurement with the APTSC, OGC and the program office. Document the evaluation whenever a significant potential OCI exists. APTSC may be consulted for examples of proper documentation.
- 4) If after these discussions the CO determines there is not a significant potential OCI, the CO should still discuss the solicitation with the Responsible Associate Director.
- 5) Based on these discussions, determine the best way to proceed for the procurement. For example, are the existing EPAAR provisions sufficient to protect against an OCI or are special measures required, such as requiring offerors to submit a conflict of interest plan which addresses how it identifies and reports conflict of interest, or other special solicitation provisions or contract clauses? In determining how to proceed for a specific procurement, COs should propose actions that allow the

identification and resolution of OCI issues early in the procurement process to avoid having contractors unnecessarily incur proposal costs only to be later disqualified from competition due to OCI issues.

- 6) Discuss the specific proposed action with involved procurement officials, OGC and the program office. However, recognize it is the CO's responsibility, not the program officials, to guard against an OCI.
- 7) If the acquisition involves a significant potential OCI and/or if special solicitation and contract provisions are proposed, the acquisition may not proceed until the Director, OAM concurs on the recommended action. The CO must route the proposed action through the QA Staff and the Responsible Associate Director to the Director, OAM. The CO's request must include background related to the potential OCI, alternative approaches considered, and the CO's rationale in his/her proposal.
- 8) Affected contractors must be provided with an opportunity to respond to any proposed actions that would withhold award from them based upon OCI considerations. The CO's rationale in proposing these actions must be thoroughly explained along with an explanation of any possible contractor actions that might allow them to be considered for award of the contract.
- 9) Responses from affected contractors must be evaluated by the CO and discussed with involved procurement officials, the APTSC, and OGC (as well as the program office, as necessary). Based on these discussions, the CO should propose a final decision to resolve the potential OCI to the Director, OAM. The CO's rationale and evaluation of the contractors' responses must be fully documented in the memorandum to the Director, OAM.
- 10) Once approved by the Director, OAM, affected parties must be informed by the CO of the final decision.
- 11) The Director, OAM, the Competition Advocate, and OGC should be immediately notified of any formal protests.

**APPENDIX 9.1A SAMPLE CLAUSES USED IN A SOLICITATION TO EXCLUDE RAC CONTRACTORS FOR AWARD OF A POLICY SUPPORT CONTRACT**

**CLAUSE 1**

Prohibition of AResponse Action Contractors@ from Being Considered Eligible for Award for AManagement Support for the Superfund Program@

A) An offeror shall be prohibited from receiving an award under this solicitation if:

- 1) It is determined that the offeror is a Response Action Contractor (RAC) (as defined below), is affiliated with a RAC, or proposes to utilize a RAC as a team subcontractor, and
- 2) It is determined that the offeror's status as a RAC, or relationship with a RAC, will create a significant potential for an actual or apparent conflict of interest in performing the contract work.

B) A Response Action Contractor (RAC) is:

- 1) Any person who enters into and is carrying out a contract or agreement to provide any response action, or ancillary services related to a response action, at a facility listed on the National Priority List (NPL); and
- 2) Any person retained or hired by a response action contractor, to provide any services related to a response action.

C) A AResponse Action@ is a CERCLA-authorized action at a Superfund site involving either a short term removal action or a long-term remedial response with respect to any release or threatened release of a hazardous substance, pollutant, or contaminant from a facility and includes any evaluation, planning, engineering, surveying and mapping, design, construction, equipment, and any ancillary services related to such removal action or remedial response.

D) The determination as to whether an offeror is ineligible for award of this contract pursuant to this clause will be made by the Contracting Officer on a case-by-case basis. The Contracting Officer has determined that award of this contract to a contractor holding certain Agency prime RAC contracts would create a significant potential for an actual or apparent conflict of interest. Accordingly, contractors holding any of the following prime contracts will be ineligible for award of this contract, such as the contracts listed below:

- Response Action Contracts (RACs);
- Superfund Technical Assessment and Response Team Contracts (START);
- Emergency and Rapid Response Services Contracts (ERRS);

## CLAUSE 2

### Determination of Response Action Contractor (RAC) Status

To be eligible for award of this contract, each offeror must demonstrate either that it is not a RAC and not affiliated with a RAC, or that its status as a RAC or relationship with RAC will not create significant potential for an actual or apparent conflict of interest in performing work under this contract.

If a prospective offeror is uncertain as to whether or not it will be considered a RAC, it may submit a complete description of the work it is performing at NPL facilities for consideration by the CO. The prospective offeror must explain the basis of its view that the work does not constitute response action work.

If the prospective offeror is not a RAC, but is affiliated with a RAC, it may submit information concerning measures it proposes to take to assure that its relationship with the RAC will not create a significant potential for an actual or apparent conflict of interest. The CO must be satisfied that any measures taken to avoid conflicts of interest will be in place at the time of contract award.

All offerors must submit the information necessary to demonstrate eligibility for contract award on or before (date). The Contracting Officer will issue a final determination as to the prospective offerors' status and eligibility to submit a proposal pursuant to the solicitation.

## **Section 9.2 Procedures for Handling Post Award Organizational Conflicts of Interest (COI)**

### **9.2.1 PURPOSE**

This section provides EPA Contracting Officers and program personnel with guidance on procedures for handling organizational conflicts of interest issues that arise after contract award.

### **9.2.2 BACKGROUND**

EPA uses contractor support in the development and enforcement of environmental standards and regulations, as well as control of toxic substances and cleanup of hazardous wastes and oil. Our contractors often work for or have financial interests in the industries for which they are providing regulatory support to EPA. Contractors are involved in the manufacture of equipment or the marketing of software systems that may be the subject of evaluation under a resultant contract. Also, potential conflicts exist when contractors are involved in the manufacture of chemicals for which product and residue chemistry data may be reviewed and evaluated. Consequently, the objectivity of the contractors' work product for EPA and the integrity of EPA's regulations and standards could be called into question by the public. Further, it may be difficult to identify conflict of interest (COI) issues at the pre-award stage and contractors' financial and business relationships are constantly changing. Therefore, while no potential COIs may have existed at contract award, conflicts may arise during the period of performance of a contract.

EPA's Superfund cleanup contractors may also work for Potentially Responsible Parties (PRPs) responsible for pollution at Superfund sites where the contractors are working for EPA. The objectivity or integrity of the work contractors perform for EPA may be called into question as a result of their relationships with PRPs. This may prejudice EPA enforcement actions and jeopardize successful cost recovery. Due to changing cleanup priorities, multiple sites, and ongoing identification of PRPs, it is often impossible to identify work at the pre-award stage that may pose COI.

Appendix 9.2A is an example of a method developed and used by the Region III Office of Acquisition and Assistance Management to evaluate whether a COI exists. These procedures can also be used when considering Limitation of Future Contracting (LOFC) requests. A parallel procedure for non-Superfund programs would be to identify the appropriate Key Indicators for the program being evaluated.

This section was originally issued as Procurement Policy Notice (PPN) 95-04 on September 20, 1995, by Betty L. Bailey, Director of the Office of Acquisition Management to OAM Division Directors, Senior Resource Officials, Regional Contracting Officer Supervisors, Ray Spears, OGC, and Devereaux (Dev) Barnes, OSWER.

### **9.2.3 AUTHORITY/APPLICABILITY**

This section is based on authority of FAR Part 9 and corresponding sections of the EPA Acquisition Regulations (EPAAR).

### **9.2.4 DEFINITIONS**

The Federal Acquisition Regulation (FAR) 2.101 defines COI as a situation in which "...because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage."

### **9.2.5 POLICY**

#### **9.2.5.1 Participants in COI Decisional Process**

A) Contracting Officers. The FAR, the EPAAR, and EPA contract clauses make it clear that a COI determination is a Contracting Officer's (CO's) responsibility. However, all EPA employees should be sensitive to identifying and avoiding COI.

The CO should evaluate COI on a case by case basis. Before making a determination regarding whether a potential COI exists, the CO must thoroughly evaluate the facts based on program, legal, and public interest concerns, taking into consideration the best interests of the Government. In evaluating a potential COI, the CO performs a risk analysis to determine whether a significant potential COI exists. If one exists, the CO evaluates whether and how the COI can be avoided, neutralized or mitigated and may request supplemental information from the contractor to aid in making a determination. The exercise of common sense, good judgment, and sound discretion is required to make a determination and to develop an appropriate means for resolving the issue. Some cases may be clear cut so that a CO can evaluate the facts and make a quick decision based on common sense and knowledge. However, the majority of COI determinations are more complex. Often, a CO does not initially have enough information to make an informed decision.



- B) Program Offices. As part of the CO's decision-making process, COs should coordinate with the program and seek program office advice. Program personnel are in the best position to provide technical advice regarding the nature and/or relationships of the applicable work. Also, they may be aware of other issues COs should consider in evaluating whether an actual or potential COI exists.
- C) Office of General Counsel (OGC) and the Acquisition Policy and Training Service Center (APTSC). OGC and APTSC are available to provide advice and assistance to the CO in evaluating and making COI determinations. OGC and APTSC review of a COI determination is required only in the following situation; When a Work Assignment/Delivery Order/Technical Direction Document (WA/DO/TDD) has been issued to a contractor and a COI is later identified which cannot be avoided, neutralized, or mitigated, the CO must consult with OGC and IOSC before canceling the work and issuing it to another contractor. This requirement does not apply to situations where contractors have been issued a WA/DO/TDD which is specifically for preliminary COI screening only. OGC and APTSC consultation is not required in any other COI determinations.
- COs may find it helpful to obtain advice from APTSC regarding remedies when a COI exists. OGC review should be requested if legal issues are raised by the CO, the contractor, or the contractor's attorney. The Office of Regional Counsel also has attorneys available for consultation on COI matters.
- D) Office of Enforcement and Compliance Assurance (OECA). Potential COI may impede successful cost recovery negotiations. OECA can provide advice on how a potential COI may impact or prejudice an enforcement and/or cost recovery action. Therefore, enforcement staff input is especially helpful where the CO is basing his/her determination on the Government's potential use of the contractor as an expert witness in cost recovery or other litigation.

#### **9.2.5.2 Examples of COI Information to Request from the Contractor**

The following are examples of the kinds of information a CO may find helpful to evaluate a post-award COI issue. There may be additional information you need to consider in evaluating a COI situation. The purpose of requesting this type of information is to assess the magnitude of a contractor's relationship with another party when evaluating potential COI.

- \$ Is the work to be performed at the same site or a contiguous site where a contractor performed work, is performing work, or will perform work for a PRP? If yes, what are the details?

- Is the work to be performed for EPA similar or related to the work performed, being performed/to be performed by the contractor for a PRP? A commercial client? An industry? Explain.
- Does the contractor have any contracts to perform work for any applicable PRP(s) and what are the terms of the contract(s)?
- Does the contractor's contract with a PRP contain any confidentiality or testimony clauses?
- Request that the contractor provide a copy of any relevant information regarding the contractor's relationship to a PRP.
- How much work was performed in the last three years for the PRP(s)/commercial client(s) that pose potential COIs?
- How much work (i.e., in dollars, percentage of business, and/or gross revenue) has the contractor performed or is in the process of performing for the PRP(s)? Commercial client(s)? Industries? What is the contractor's gross revenue for each of the past three years?
- When did the contractor perform the applicable work for the PRP(s)? Commercial client(s)? Industries?
- Is work currently being performed for the PRP(s)? Commercial client(s)? Industries? If yes, what work and how long is the work expected to continue?
  - If the work in question involves an organizational relationship, what is the relationship between the parties? Does the work involve a parent, subsidiary, affiliate, etc.?
- Is the contractor under contract or does it have some other arrangement with any relevant public or private clients to begin providing services/work efforts that may represent a potential COI?
- Does the contractor own or have any financial interest in a specific technology, equipment, system, or software which will be evaluated under this contract?
- Request that the contractor provide any other pertinent information bearing on the COI of which the contractor may be aware that has not been specifically requested by EPA.

### 9.2.5.3 Examples of Basic COI Information Available Within the Agency

- What is the value of the WA/DO/TDD? Is it a significant amount? (Note -- While this is useful information, often the dollar value is not as relevant to COI decisions as the type of work to be performed).
- Does the work performed or to be performed for EPA relate to an existing or potential cost recovery and/or enforcement action?
- Will the contractor/subcontractor testify on behalf of the United States in the litigation?
- What are the concerns in this regard if the contractor/subcontractor were to testify?
- Will the contractor testify for the PRP?
- Has a consent decree or an administrative order been signed? If so, what are the terms of the agreement? (For example, is the party with whom the contractor has a relationship a signatory of the consent decree, and if so, what are the terms?)
- Will the work be used to support an Agency regulation or standard? If so, does the contractor have any clients that would directly benefit from the Agency regulation or standard?
- Is the work non-discretionary in nature or does it involve some degree of judgment or discretion on the contractor's part?

### 9.2.5.4 Time Frame for Evaluating Post Award Conflicts

The Agency is committed to providing timely responses on COI issues to contractors. As a general rule, COs should strive to resolve COI issues within 10 working days of receipt of all relevant information. Failure to deal with COIs in a timely manner could cause contractors to lose business and delay implementation and work on EPA programs and projects. COs should coordinate with contractors and programs to establish specific response/decision timeframes for individual COI issues.

#### **9.2.5.5 Documenting COI Decisions**

COs should maintain records of COI decisions and related correspondence in the official contract file. COs should forward an information copy of all COI decisions to APTSC. In turn, APTSC will analyze the COI decisions to ensure consistency across the Agency and as a basis for developing and scheduling additional COI training.

#### **9.2.5.6 Waiver Procedures**

If a determination is made that a conflict cannot be avoided, neutralized, or mitigated but it is in the best interest of the Government to award/continue the WA/DO/TDD, a request for waiver must be approved by the Head of the Contracting Activity (HCA). COI waivers are not required under initial time-critical response actions under the Emergency Response Cleanup Services (ERCS) or the Emergency and Rapid Response Services (ERRS) programs. However, the emergency response contractor would still be required to disclose the COI in accordance with the timeframes stated in the contract.

## APPENDIX 9.2A COI EVALUATION EXAMPLE RED LIGHT/GREEN LIGHT PROCEDURE

Determine which indicators are applicable and pertinent for the specific COI issue to be evaluated. The sample indicators provided below are a beginning point and will normally be useful in the majority of Superfund COI cases.

Score each "COI Indicator" by color coding the indicator **RED** for those indicators that present a high risk, or **GREEN** for those indicators that present a low risk. HINT: If you are unsure whether to mark an indicator either red or green, consider marking it half green and half red, or **YELLOW**. After each indicator has been evaluated and color coded, a visual picture will emerge to help in evaluating whether or not a conflict exists. If all of the indicators are green, the probability will be low that a conflict exists. If all of the indicators are red, the probability will be very high that a conflict does exist. If the indicator colors are a mixture of red and green, or yellow, the indicators in red must be given more careful consideration before making the decision. Be aware that some indicators may be more important than other indicators, depending on the facts involved in a particular situation. Thus, in a circumstance where there may be only one red indicator and all the other indicators are green, the COI may be of sufficient seriousness that a conflict would still exist and the contractor should not perform the work.

NOTE: This "red light/green light" process will not necessarily provide the best response for the Agency for all COI cases. Therefore, this method should not be considered the definitive answer or procedure to use when evaluating and making COI decisions, but rather used as a tool to improve consistency and timeliness in evaluating COI issues.

### Sample COI Indicators:

#### A) Same Site

- Is the work to be performed at the same site or a contiguous site where the Contractor performed/is performing/will perform work for a PRP?

#### B) Related Services

- Is the type of work to be performed for EPA similar to the type of work performed for the PRP?
- Does the work to be performed for EPA impact the manner in which the contractor may already be performing related tasks?

## C) WA Value

- What is the value of the WA?
- Is the value of the WA a significant amount?  
(NOTE: Even if the dollar value is low, if COI is an issue, the work product from the WA could be "tainted," that is, its credibility could be in question. Also, since it is possible that the work product or, at least data/information from the WA will be used later in the process (of site decision-making/cleanup), it could potentially affect other work.)

## D) Financial Dollar Relationships

- How much work [in dollars (\$) and/or percentage (%) of company revenue/gross] has the contractor performed for the PRP(s)/commercial client(s)/industry?
- Is the amount of work such that the contractor's credibility and bias could be questioned or challenged?
- Have any Confidential Clients been identified? If so, has the contractor disclosed any information other than it only has a confidential client? If not, obtain as much information as is possible to make a determination or decision without violating the contractor's confidentiality agreements.

## E) Past, Present, and/or Future Relationship(s) (\$)

- When did/will the contractor perform the work for the PRP(s)/commercial client(s)?
- Is work currently being performed for the PRP(s)/commercial client(s)? And if so, what work?
- How much work was performed for the PRP(s) in the last three years?
- Does the contractor have any contracts or other arrangements to perform work for any applicable PRP(s)?

F) Sensitivity/Visibility

- Are there any extenuating circumstances that would cause this work to be considered sensitive or highly visible? (e.g., a Superfund Accelerated Cleanup Model cleanup, press coverage, special Congressional interest.)
- Could release of sensitive information endanger the Agency's cost recovery and/or enforcement actions?

G) Other

- Add any other factors that are applicable and require evaluation, but are not included above, for example:
- If the work in question involves an organizational relationship, what is the relationship between the parties? Is it a parent, subsidiary, affiliate, sister organization, etc.
- Has a consent decree been signed? If so, who signed and what are the terms?

After completing the evaluation of each COI indicator, before a decision is made, consider whether litigation has, is, or will occur, and whether the work involved will or will not result in any enforcement action(s).

## Section 9.3 Early Conflict of Interest (COI) Disclosure

### 9.3.1 PURPOSE

This section establishes internal policy and guidance for Early COI Disclosure. Procedures to facilitate a contractor's ability to assess their ability for award and to assemble conflict free teams, if applicable, in preparing proposals.

### 9.3.2 BACKGROUND

Contractors have expressed concerns about being disadvantaged when assessing their eligibility for award and in preparing competitive proposals when the Agency's final COI strategy is not disclosed timely. Untimely disclosure affects potential contractor teaming arrangements because additional time is often required to establish a competitive team and COI strategies can significantly impact the makeup of a competitive team. Late disclosure of a procurement's COI strategy may not allow contractors sufficient time to establish new competitive teaming arrangements if an original team member will no longer be eligible for award due to a COI. If contractors cannot appropriately assess their eligibility and establish competitive teams, it may ultimately impact the amount of competition the Agency receives for the procurement.

To address this issue, and to help ensure that EPA receives the greatest amount of competition possible, OAM issued a memorandum on Early COI Disclosure (August 1998) which encouraged contracting officers (COs) to notify the contracting community at the earliest available opportunity about COI issues. Although this essentially voluntary procedure significantly improved the Agency's early COI disclosure record, there still remained a sufficient number of procurements in which early COI disclosure was not made timely and the amount of competition was negatively impacted. Therefore, this policy establishes a new internal process in order to facilitate early disclosure of COI strategies.

This section was originally issued as Procurement Policy Notice 02-02 on April 13, 2003, from Judy S. Davis to Senior Resource Officials, OAM Division Directors, Regional Contracting Officer Supervisors and the Office of General Counsel.

### 9.3.3 AUTHORITY/APPLICABILITY

The authority for this section is based on FAR subpart 9.5, EPAAR subpart 1509.5. **9.3.4**

### DEFINITIONS *(Reserved)*



### 9.3.5 POLICY

#### 9.3.5.1 COI DISCLOSURE CATEGORIES

For purposes of early COI disclosure, all Agency procurements will be categorized by contracting officers into one of the following three categories:

**Category 1** - Requirements that have no COI issues;

**Category 2** - Requirements that have COI issues, but in which the COI strategy for the followon procurement does not change from the previous or current contract; or

**Category 3** - Requirements that have COI issues and are either a new, first time requirement or the COI strategy for the follow-on requirement(s) has changed from the current contract strategy.

#### 9.3.5.2 EARLY COI PUBLICATION/NOTIFICATION

For all Agency requirements, early COI procurement information and strategies shall be published and made available to the contracting community to the maximum practical extent and at the earliest available opportunity. In addition, for all Category 3 procurements, COs shall document, with adequate justification, in their findings and recommendation(s) in the contract file whether the COI strategy should or should not include additional disclosure notice time. If the finding is that additional disclosure time is required, the documentation should address the amount of additional time needed. (See discussion below on Amount of Time for Early Disclosure Notification and Waiver Procedures for more details.) Normally, this documentation should be included as part of the CO's COI Plan memorandum. Following are mechanisms which shall be used, as applicable and appropriate, for early COI notification.

##### 9.3.5.2.1 ACQUISITION FORECAST DATABASE NOTICES

For Category 1 type procurements, the information on the Acquisition Forecast Database shall state that there are no COI issues for this requirement. For both Category 2 and Category 3 requirements, when known, all pertinent and appropriate COI information, in addition to the COI strategy including eligibility for award disclaimers shall be posted on OAM's Acquisition Forecast Database along with all the other data normally posted in the Forecast Database. Pertinent and appropriate COI information shall normally include any known or contemplated restrictions or eligibility requirements, as well as all significant COI clauses, including the Limitation of Future Contracting (LOFC) clause. If the COI information is not yet known, the previous COI strategy shall be posted and identified as the previous COI strategy.

### **9.3.5.2.2 OAM'S SOLICITATION AND AMENDMENT WEBPAGES**

When the COI strategy for applicable solicitations is known or when it changes after initial or subsequent announcements, all Apertinent and appropriate@ COI information, as defined in the above paragraph, shall be posted on the OAM webpage for Solicitations and Amendments. For Category 1 type procurements, the information shall state that there are no COI issues for this procurement. For both Category 2 and Category 3 procurements, all Apertinent and appropriate@ COI information shall be posted in conjunction with the other procurement data usually posted on the webpage.

### **9.3.5.2.3 OTHER EARLY DISCLOSURE NOTICE MECHANISMS**

When appropriate, the following mechanisms shall be used to inform contractors about the Agency's COI strategy as early as practical in the procurement cycle.

- A) Post the statement of work and appropriate COI information and strategy simultaneously on the Internet when asking industry for comments;
- B) Include the Agency's COI information and strategy in any announcements and/or publications when soliciting sources;
- C) Disclose the Agency's COI strategy when meeting with contractors during the pre-solicitation phase; and
- D) Include the COI strategy and/or Limitation of Future Contracting restrictions in the FedBizOpps announcement.

### **9.3.5.3 ADDITIONAL TIME FOR EARLY COI DISCLOSURE NOTIFICATION**

There may be occasions when the above steps do not provide adequate early COI disclosure notice to contractors because, for example, preliminary or draft strategies may change by the time the final strategy is determined. In those cases when the COI disclosure time is clearly insufficient for contractors to reasonably assess their eligibility for award and to submit a competitive proposal, additional disclosure notice time shall be added to procurement lead times except when a waiver has been approved by the Chief of the Contracting Office (CCO). A waiver may be requested when it is determined that urgent and compelling reasons necessitate the need to not provide additional disclosure time. Normally the waiver request should be included as part of the CO's COI Plan memorandum. If the COI Plan was previously approved, the waiver will be a separate document. Waiver requests shall be routed through the Policy and Oversight Service Center (APTSC) and the Competition Advocate prior to approval.

The following guidelines shall be used to assess and determine how much additional advance notice time should be provided to contractors in order for them to adequately assess their eligibility for award, establish a teaming arrangement, or prepare a timely competitive proposal.

A) For COI disclosure Category 1 and 2 requirements, the normal/regular solicitation and award lead times may be followed for the supplies and/or services being procured.

B) For COI disclosure Category 3 requirements, COs shall evaluate each procurement on its own merits to determine how much additional COI disclosure time should be added to the normal procurement milestones to ensure adequate competition. The determination of the amount of additional time to be added is the responsibility of the CO and should be based on the significance of the procurement's COI strategy, i.e., eligibility for award criteria, LOFC clause restrictions, disclosure requirements, etc. As a general rule, additional procurement lead time shall be at least fifteen (15) calendar days.

The following is offered for guidance when assessing and determining how much additional disclosure time should be added to a procurement's lead time. If the proposed COI strategy is anticipated to affect the eligibility of a number of current Agency contractors or anticipated offerors, an additional 45 to 60 calendar days may be reasonable. If, on the other hand, a COI strategy is only slightly different from past strategies on similar contracts, an additional 15 calendar days may be more reasonable. For additional assistance in evaluating and determining a reasonable amount of additional time, contact the APTSC Manager.

Additional early COI disclosure notification time may be provided by the following mechanisms:

A) Hold the release of the solicitation for the identified number of additional days after the date of publication of the A<sub>final</sub>@ COI strategy. For example, if it was decided to add an additional 27 days of notice time to a procurement and the final COI Plan was approved in conjunction with the posting in FedBizOps on the 1<sup>st</sup> day of the month, the solicitations would not be released until the 28<sup>th</sup> day of the month.

B) Extend the number of days a solicitation would normally have been open by the number of additional days determined. For example, if it was determined to add an additional 15 days of notice time to a procurement and the solicitation would normally have been open for 45 days, close the proposal period in 60 days.

C) Utilize any combination of the above two methods that add the number of additional days determined. For example, if it was determined to add an additional 15 days of notice time to a procurement, the release of the solicitation could be held for an additional 5 days and the solicitation's due date could be extended an additional 10 days.

In addition, as applicable, COs are further encouraged when possible, to supplement these early COI disclosure procedures with other early disclosure mechanisms as determined appropriate by them to ensure contractors are provided with the earliest possible COI disclosure notification.